

18-55971

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KARL J. RUSSELL,

Plaintiff-Appellant,

v.

R. LOPEZ, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of California

No. 3:15-cv-02280-BAS-KSC
The Honorable Cynthia Bashant, Judge

**DEFENDANT-APPELLEE LOPEZ'S MOTION
TO STRIKE APPELLANT'S EXHIBITS IN
SUPPORT OF HIS REPLY BRIEF**

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INTRODUCTION

On March 13, 2019, Plaintiff-Appellant Russell filed a document entitled “Optional Reply Brief,” which contained additional exhibits. These exhibits were not part of the record below. The factual record on appeal is limited to the evidence admitted to the district court. Accordingly, the Court should strike Russell’s exhibits.

BACKGROUND

In this civil-rights action, Plaintiff-Appellant Russell challenges the district court’s order dismissing his excessive-force claim for violating the favorable-termination rule of *Heck v. Humphrey*, 512 U.S. 477 (1977), and for his failure to exhaust administrative remedies. Defendant-Appellant filed his answering brief on February 19, 2019, and Russell filed his reply brief on March 7, 2019.

Russell attached four separate exhibits to his reply brief. (Pl.’s Reply 6-11, ECF No. 29.) Russell included a letter from the Associate Warden at Richard J. Donovan Correctional Facility and three declarations from different inmates. (*Id.*) Russell contends that these exhibits show defendants, including Lopez, caused the constitutional violations alleged. (*Id.* at 3.) None of these exhibits were submitted to the district court.

ARGUMENT

Russell seeks to expand the appellate record with four exhibits that were not part of the district court's record. Russell offers a letter and three inmate declarations as new evidence of constitutional violations. But none of these documents were ever submitted to the district court, and therefore are not part of the record on appeal. The Court should strike them from the record.

Federal Rule of Appellate Procedure 10(a) provides that the record on appeal consists of documents filed in the district court. Generally, "papers not filed with the district court or admitted into evidence by that court are not part of the clerk's record and cannot be part of the record on appeal." *Kirshner v. Uniden Corp. of Am.*, 842 F.2d 1074, 1077 (9th Cir. 1988). Accordingly, evidence improperly included in the record, and references to such evidence, are subject to a motion to strike and may not be considered by this Court in adjudicating an appeal. *See Tonry v. Security Experts, Inc.*, 20 F.3d 967, 973-74 (9th Cir. 1994) (refusing to consider an arbitrator's decision or references to arbitration proceedings because such information was never filed in the district court); *Kirshner*, 842 F.2d at 1077-78 (striking and refusing to consider a declaration which was never filed with or submitted to the district court).

Here, none of the exhibits attached to Russell's reply brief were part of the district court's record. Nor are they relevant for any determination of any issues in

the present appeal. Accordingly, Russell's submission is improper and the Court should strike the exhibits.

CONCLUSION

Russell's exhibits were not part of the district court record and should not be considered on appeal. The Court should grant Defendant's motion to strike.

Dated: March 21, 2019

Respectfully Submitted,

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CERTIFICATE OF SERVICE

Case Name: **Karl J. Russell v. R. Carrion,
et al.**

No. **18-55971**

I hereby certify that on March 22, 2019, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

- **DEFENDANT-APPELLEE LOPEZ'S MOTION TO STRIKE APPELLANT'S EXHIBITS IN SUPPORT OF HIS REPLY BRIEF**

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

I further certify that some of the participants in the case are not registered CM/ECF users. On March 22, 2019, I have caused to be mailed in the Office of the Attorney General's internal mail system, the foregoing document(s) by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within three (3) calendar days to the following non-CM/ECF participants:

Karl J. Russell, G-41933
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In Pro Per

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on March 22, 2019, at Sacramento, California.

B. Noorani
Declarant

/s/ *B. Noorani*
Signature